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Central District of California
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NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

STEINY AND COMPANY, INC.,

Debtor(s).

Case No.: 2:16-bk-25619-WB

CHAPTER 11

MEMORANDUM OF DECISION

Date: February 2, 2017

Time: 10:00 AM

Courtroom: 1375

Before the Court is a motion for administrative expenses (“Motion”) filed by the trustees (“Trustees”) of the following trusts: the Southern California IBEW-NECA Defined Contribution Trust Fund, the Southern California IBEW-NECA Health Trust Fund, the Southern California IBEW-NECA Supplemental Unemployment Benefit Trust Fund, the Los Angeles County Electrical Educational and Training Trust Fund, National Electrical Benefit Fund, the Southern California IBEW-NECA Labor-Management Cooperation Committee Trust Fund, Contract Compliance Trust Fund, and Los Angeles Electrical Workers Credit Union (collectively, “the IBEW-NECA Trusts”). Debtor Steiny and Company, Inc. (“Debtor”) pays monthly

1 contributions to these labor-management multiemployer trusts, which then provide certain fringe
2 benefits to Debtor's union employees. In their Motion, the Trustees assert that the contribution
3 for November 2016¹ is delinquent, and they request that the Court treat such contribution as an
4 administrative expense pursuant to 11 U.S.C. §§ 503(b) and 507(a)(2). The Trustees also request
5 that the Court require Debtor to pay interest, liquidated damages, and attorneys' fees incurred as
6 a result of the delinquency² and that such amounts also be treated as administrative expenses.
7 Finally, the Trustees request that the Court order immediate payment of their claim, if the claim
8 is accorded administrative expense priority. Debtor and the Official Committee of Unsecured
9 Creditors oppose all of the Trustees' requests.

10 A hearing on the Motion was held on February 2, 2017 at 10:00 a.m. The Court heard
11 oral argument and took the matter under submission. Based on the pleadings, record, and oral
12 argument of counsel, and for the reasons that follow, the Court denies the Motion. The Trustees'
13 claim for the November 2016 contribution is entitled to fifth priority status under § 507(a)(5), up
14 to the statutory cap provided therein. Any amount of the November 2016 contribution that
15 exceeds the maximum payment allowed under § 507(a)(5) will be treated as a general unsecured
16 claim. The Trustees' claim for interest, liquidated damages, and attorneys' fees, totaling
17 \$10,873.83, will be treated as a general unsecured claim.

18 I. STATEMENT OF FACTS

19 Debtor filed a voluntary Chapter 11 bankruptcy petition on November 28, 2016. Debtor
20 is a privately held electrical contracting and engineering company with commercial, mass transit,
21 industrial, traffic signal, control, and lighting divisions. Debtor continues to operate its business.

22 Debtor is a party to various collective bargaining agreements ("CBAs") that require
23 Debtor to make monthly contributions to the IBEW-NECA Trusts for each hour of covered work
24 that Debtor's union employees perform. Pursuant to these CBAs, monthly contributions are due
25 on the tenth day of the month, for work performed the previous month, and are considered
26

27 ¹ According to the Trustees, the November 2016 contribution amounts to \$169,337.88. However,
28 the Trustees only seek to collect \$139,911.40 of that amount, based on the report that Debtor
submitted for November 2016.

² The Trustees request \$829.49 in interest; \$4,197.34 in liquidated damages; and \$5,847.00 in
attorneys' fees.

1 delinquent if not paid by the fifteenth day of the month. If a contribution is delinquent, Debtor is
2 required to pay the Trustees of the IBEW-NECA Trusts interest, liquidated damages, and any
3 attorneys' fees and costs the Trustees have incurred as a result of their collection efforts. Debtor
4 has not yet rejected the CBAs.

5 Debtor's payroll period for November 2016 ended on November 27, 2016. The
6 November 2016 contribution to the IBEW-NECA Trusts then came due post-petition, on
7 December 10, 2016. Such contribution became delinquent on December 15, 2016. To date,
8 Debtor still has not paid the November 2016 contribution.

9 In their Motion, the Trustees acknowledge that the November 2016 contribution is based
10 on hours worked pre-petition between November 1, 2016 and November 27, 2016. However,
11 because the contribution came due post-petition and became delinquent post-petition, the
12 Trustees argue that the Court should treat the contribution, along with any interest, liquidated
13 damages, and attorneys' fees, as an administrative expense.

14 II. DISCUSSION

15 This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b) and 1334(b).
16 This matter is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (B), and (K). Venue is proper
17 in this Court. 28 U.S.C. § 1409(a) (2017).

18 A. Legal Standard for Administrative Expense Priority

19 In bankruptcy, certain unsecured claims are given priority treatment under § 507. 11
20 U.S.C. § 507(a)(1)-(10) (2017). Among these are administrative expense claims allowed
21 pursuant to § 503(b), which are given second priority status and are generally limited to post-
22 petition expenses. 11 U.S.C. § 507(a)(2); *In re Kadjevich*, 220 F.3d 1016, 1019-20 (9th Cir.
23 2000). Such claims include those for "the actual, necessary costs and expenses of preserving the
24 estate, including wages, salaries, and commissions for services rendered *after the commencement*
25 *of the case.*" 11 U.S.C. § 503(b)(1)(A)(i) (emphasis added). A creditor requesting
26 administrative expense treatment under § 503(b)(1)(A) has the burden of proof and must show
27 that the claim (1) arose post-petition (2) from a transaction with the trustee or debtor-in-
28 possession and (3) directly and substantially benefited the estate. *In re DAK Indus., Inc.*, 66

1 F.3d 1091, 1094 (9th Cir. 1995).

2 Section 507 also gives priority status to claims for wages and contributions to employee
3 benefit plans that were earned within a certain amount of time before the bankruptcy petition was
4 filed. See 11 U.S.C. §§ 507(a)(4)-(5). With regard to employer contributions to employee
5 benefit plans, § 507 accords fifth priority status to such contributions if they arose from services
6 rendered within 180 days before the bankruptcy petition date or the date the debtor-employer
7 ceased doing business, whichever is earlier. 11 U.S.C. § 507(a)(5).

8 The Trustees argue that Matter of Pacific Far East Line, Inc., 713 F.2d 476 (9th Cir.
9 1983), is controlling Ninth Circuit authority that this Court is bound to follow. This Court
10 disagrees. In Pacific Far East Line, a case decided under the old Bankruptcy Act, the court held
11 that a trustee's payments to a maritime association for employee benefits were properly
12 classified as administrative expenses even though the payments were determined based on
13 employee hours worked pre-petition. 713 F.2d at 478-80. This Court believes that Pacific Far
14 East Line has limited persuasive authority because it was decided under the old Act and before
15 the enactment of both § 1113, which addresses the assumption and rejection of collective
16 bargaining agreements, and § 507(a)(5), which assigns fifth priority unsecured status to
17 contributions to employee benefit plans. The issue here is the interplay between § 1113 and §
18 507(a)(5) in determining whether an employee benefit plan contribution should be given
19 administrative priority status. There is no controlling Ninth Circuit authority on this issue.
20 However, this issue was addressed in In re Certified Air Techs., Inc., 300 B.R. 355 (Bankr. C.D.
21 Cal. 2003). This Court finds the reasoning of the Certified Air court persuasive.

22 In Certified Air, the court considered whether several pre-petition claims for employee
23 benefit plan contributions, along with requests for liquidated damages and attorneys' fees
24 incurred as a result of the delinquent contributions, should be given administrative priority status.
25 300 B.R. at 357-60. The debtor was a party to CBAs that required payment of such
26 contributions. Id. After deciding that the priority scheme of § 507 applied to employees covered
27 by a CBA, the court examined the relationship between § 507 and § 1113. Id. at 369. In light of
28 the legislative history of § 1113 and the approach taken by a majority of the circuits that had

1 considered the issue, the Certified Air court determined that the priority scheme of § 507
2 trumped any purported “super-priority” status that could be assigned to pre-petition wage and
3 benefit claims as a result of § 1113. Id. at 366-69.

4 Section 1113 provides a detailed scheme that a debtor-in-possession must follow in order
5 to reject a pre-petition CBA. See 11 U.S.C. § 1113. The relevant subsection that has been
6 asserted as giving a “super-priority” status to wage and benefit claims arising out of a pre-
7 petition CBA states that “[n]o provision of this title shall be construed to permit a trustee [or
8 debtor-in-possession] to unilaterally terminate or alter any provisions of a collective bargaining
9 agreement prior to compliance with the provisions of this section.” 11 U.S.C. § 1113(f).

10 However, the Certified Air court determined that assigning such meaning to § 1113(f) causes
11 that section to conflict with § 507, which cannot have been the result intended by Congress:

12 Construing § 1113(f) as mandating super-priority status for pre-petition wage and
13 benefit claims under a collective bargaining agreement in chapter 11, but not in
14 chapter 7, leads to anomalous results. . . . Section 1113 was enacted to protect the
15 existence of collective bargaining agreements in chapter 11 cases, not to re-order
16 the priority scheme set by Congress in § 507. Had Congress intended for § 1113
17 to create a super-priority for pre-petition wage and benefit claims arising under a
18 collective bargaining agreement, it would have either included language in § 1113
19 similar to that incorporated into § 1114 or amended § 507 to reflect the change it
intended. *Because Congress neither included explicit language in § 1113 to
supersede § 507 nor amended § 507 to specifically create a super-priority status
for such claims, the court concludes that pre-petition claims for wages and
benefits due under a collective bargaining agreement are not entitled to treatment
as administrative expenses but are to be accorded priority consistent with § 507.*

20 Certified Air, 300 B.R. at 368-69 (emphasis added). This analysis aligns with the Ninth Circuit’s
21 observation that “the scope of priorities should be strictly construed because ‘preferential
22 treatment of a class of creditors is in order only when clearly authorized by Congress.’” In re
23 Consol. Freightways Corp. of Del., 564 F.3d 1161, 1167 n.14 (9th Cir. 2009) (quoting Howard
24 Delivery Serv., Inc. v. Zurich Am. Ins. Co., 547 U.S. 651, 655 (2006)).

25 Accordingly, the Certified Air court declined to assign administrative expense priority to
26 the pre-petition benefit claims and related damages based on § 1113. See 300 B.R. at 363-65
27 (characterizing In re World Sales, 183 B.R. 872 (B.A.P. 9th Cir. 1995), as inapplicable, since the
28 claim at issue there was based on payments due under a CBA for post-petition work). Instead,

1 the court assigned the employee benefit plan contributions, which accrued within 180 days
2 before the filing of the debtor's bankruptcy petition, fourth priority status³ in accordance with the
3 relevant subsection of § 507. Id. at 372. The court then allowed the related liquidated damages
4 and attorneys' fees as general unsecured claims, since § 507 does not classify such amounts as
5 priority unsecured claims, even when associated with priority wage and benefit claims. See id. at
6 369, 372.

7 B. The Trustees' Claim for the November 2016 Contribution, Based on Pre-Petition Hours
8 Worked, is Not Entitled to Administrative Expense Priority.

9 The Trustees concede that the November 2016 contribution is based on hours worked
10 between November 1, 2016 and November 27, 2016. Debtor filed its bankruptcy petition on
11 November 28, 2016. Therefore, this debt arose pre-petition and consequently is not entitled to
12 administrative expense priority under § 507(a)(2), since this subsection only accords such
13 priority to services rendered post-petition.

14 Further, § 507(a)(5) specifically covers the circumstances here. The Trustees' claim
15 arises out of Debtor's November 2016 contribution to various employee benefit plans. Debtor
16 has not yet ceased doing business; therefore, the operative date for purposes of § 507(a)(5) is the
17 petition date. The work that gave rise to the November 2016 contribution was performed in the
18 month before the petition was filed. Thus, such services were rendered within 180 days before
19 the petition date. Therefore, under § 507(a)(5), the Trustees' claim is entitled to fifth priority
20 status. The language of § 1113(f) does not change this circumstance, especially since that
21 subsection does not accord any special priority status to pre-petition claims arising out of CBAs.
22 Rather, § 1113(f) merely ensures that a pre-petition CBA will not be rejected without the
23 employer-debtor having first followed the procedures provided in § 1113.

24 Accordingly, the Court assigns fifth priority status to the Trustees' claim for the
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26 ³ When Certified Air was decided, § 507 only included nine categories of unsecured priority
27 claims, with administrative expense claims receiving first priority, pre-petition wage claims
28 receiving third priority, and pre-petition employee benefit plan contributions receiving fourth
priority. 300 B.R. at 360. Each of these categories moved one level lower in priority when the
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added a new first priority
for domestic support obligations. See 11 U.S.C. § 507(a)(1); Kathleen P. March et al., Cal.
Practice Guide: Bankruptcy § 17:441 (The Rutter Group 2016).

1 November 2016 employee benefit plan contribution, up to the statutory cap provided in §
2 507(a)(5). Any amount of the November 2016 contribution that exceeds the maximum payment
3 allowed under § 507(a)(5) will be treated as a general unsecured claim.

4 C. The Trustees' Claim for Interest, Liquidated Damages, and Attorneys' Fees Will Be Treated
5 as a General Unsecured Claim.

6 As in Certified Air, the Court determines that § 507 does not grant priority status to
7 interest, liquidated damages, and attorneys' fees incurred as a result of delinquent, pre-petition
8 employee benefit plan contributions. This notion holds true even when such amounts are related
9 to employee benefit claims allowed under § 507(a)(5).

10 Therefore, although the Trustees' claim for the November 2016 contribution is entitled to
11 priority under § 507(a)(5), the Trustees' claim for the associated interest, liquidated damages,
12 and attorneys' fees will be treated as a general unsecured claim.

13 D. Since Neither Portion of the Trustees' Claim is Entitled to Administrative Expense Priority,
14 the Court Will Not Order Immediate Payment of the Trustees' Claim.

15 The decision about when administrative expenses will be paid lies within the discretion
16 of the bankruptcy court. In re Verco Indus., 20 B.R. 664, 665 (B.A.P. 9th Cir. 1982) (citing In
17 re Standard Furniture Co., 3 B.R. 527, 532 (Bankr. S.D. Cal. 1980)). In determining whether an
18 administrative expense should be paid immediately, courts often consider the following factors:
19 (1) the likelihood that all administrative claimants will be paid in full; (2) whether the
20 administrative claimant could repay any payment that later proves to be excessive; (3) if the case
21 is a Chapter 13 or 11 case, how close the case is to confirmation; and (4) whether the expense
22 was incurred in the ordinary course of the debtor's business. Kathleen P. March et al., Cal.
23 Practice Guide: Bankruptcy § 17:730 (The Rutter Group 2016) (citing In re Cardinal Indus., Inc.,
24 109 B.R. 738, 742-43 (Bankr. S.D. Ohio 1989); In re W. Farmers Ass'n, 13 B.R. 132, 135
25 (Bankr. W.D. Wash. 1981)). If it appears that there are insufficient assets to pay all
26 administrative claims in full, immediate payment is disfavored. In re Conchise College Park,
27 Inc., 703 F.2d 1339, 1356 n.22 (9th Cir. 1983).

28 Here, as discussed previously, the Court has determined that no portion of the Trustees'

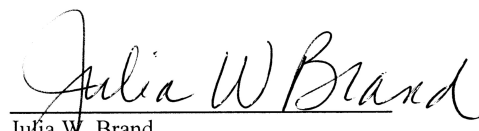
1 claim will be treated as an administrative expense. Consequently, immediate payment of the
2 Trustees' claim is neither necessary nor appropriate.

3 III. CONCLUSION

4 In summary, the Court holds that the Trustees' claim, comprised of the November 2016
5 employee benefit plan contribution and related interest, liquidated damages, and attorneys' fees,
6 is not entitled to administrative expense priority and, therefore, need not be paid immediately.
7 Rather, the November 2016 contribution is entitled to fifth priority status, since it is based on
8 work performed within 180 days before Debtor filed its bankruptcy petition. Further, the
9 interest, liquidated damages, and attorneys' fees incurred by the Trustees as a result of the
10 delinquent contribution do not constitute a priority unsecured claim. Accordingly, the Trustees'
11 Motion is denied. The Trustees may file a claim comprised of the following amounts: (1) the
12 November 2016 contribution, which will be treated as a priority unsecured claim under §
13 507(a)(5), up to the statutory cap provided therein; (2) any amount of the November 2016
14 contribution that exceeds the maximum payment allowed under § 507(a)(5), which will be
15 treated as a general unsecured claim; and (3) interest, liquidated damages, and attorneys' fees in
16 the total amount of \$10,873.83, which will be treated as a general unsecured claim.

17 A separate order consistent with this memorandum of decision will be entered.
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25 Date: May 3, 2017

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27 Julia W. Brand
28 United States Bankruptcy Judge